

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
E. T. FITZGERALD, P.J., D.E. HOLBROOK, Jr., and G.R. McDONALD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court No. 119889

DONNA ALICE YOST,

Defendant-Appellee.

Court of Appeals No.234065
Circuit Court No.001304-AR

**BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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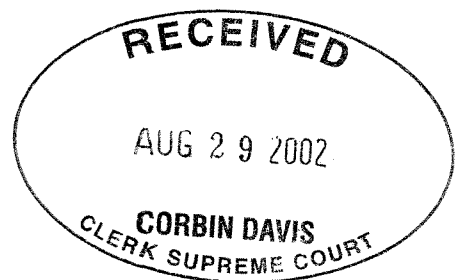


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JURISDICTIONAL STATEMENT AND STATEMENT OF THE FACTS

The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, adopt the Jurisdictional Statement and Statement of the Facts as thoroughly presented in the People's brief.

STATEMENT OF THE QUESTION

I.

The purpose of a preliminary examination is to weed out groundless and unsupported charges. An examining magistrate may not fail to bind over by finding a witness not to be credible simply because the evidence conflicts or a possible reasonable doubt exists; in short, where there are *triable issues of fact*. Should this court adopt a modified directed-verdict standard for the decision whether to bind over for trial?

Amicus answers: "YES"

ARGUMENT

I.

The purpose of the preliminary examination is to weed out groundless and unsupported charges. An examining magistrate may not fail to bind over as charged by finding a witness not to be credible simply because the evidence conflicts or a possible reasonable doubt exists; in short, where there are *triable issues of fact*. This Court should adopt a modified directed verdict standard for the decision whether to bindover for trial.

A. Introduction

The District Court in this case noted a conflict in testimony between two witnesses and then made a credibility determination as to which witness it believed. The Circuit Court, reviewing the District Court's bindover, found that the District Court exceeded its authority by making a credibility determination in a manner so as to become the ultimate factfinder. This Court has asked that three questions be addressed: 1) whether the refusal to bind over was an abuse of discretion under the facts of this case,¹ 2) the role of the magistrate at the preliminary examination in assessing the credibility of a witness and 3) whether the reviewing court applied the correct standard of review in this case. The question before this court is one with which many states have grappled. In *State v Clark*,² for example, the Utah Supreme Court recognized that

¹ As Amicus, this brief will defer to Appellee's brief to all aspects that argue the facts of this case and Amicus will address the analytical aspects that relate to these question. This brief, however, will suggest that the abuse of discretion standard should not be applied to the preliminary examination.

²*State v Clark*, 20 P 3d 300 (Utah 2001).

confusion and inconsistency as to the magistrate's responsibilities at the preliminary examination required clarification of the point:

- We turn to the question of what quantum of evidence is sufficient to support a finding of probable cause at the preliminary hearing stage of a prosecution . We have taken various approaches in articulating an answer to this question.
- In some cases we have described the State's burden of proof at a preliminary hearing by comparing it to the burdens applicable at other stages of a criminal prosecution. We have held that the quantum of evidence necessary...is 'more than is required to establish probable cause for arrest'....We have further held that the probable cause standard is also 'less than would prove the defendant guilty beyond a reasonable doubt.' Indeed, we recently stated: 'The probable cause standard is lower, even, than a preponderance of the evidence standard applicable to civil cases'....
- In a number of cases, we have equated the preliminary hearing probable cause standard with the motion for directed verdict,...(stating in one case that) 'the prosecution must establish a *prima facie* case against the defendant from which the trier of fact could conclude that the defendant was guilty of the offense' (and in another) equating the probable cause standard with the standard for a directed verdict in a civil case, i.e., 'unless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which, supports the prosecution's claim, the magistrate should bind the defendant over for trial.'...
- However, any conclusions that the preliminary hearing probable cause standard is the same as the directed verdict standard is weakened by our other descriptions of the preliminary hearing standard....[D]espite our recent efforts to clarify, the exact meaning of the probable cause standard, remains somewhat confusing.³

³ The Utah's Supreme Court's resolution of the matter will be discussed later in the brief.

So also in Michigan, particularly as to the question of the role of the examining magistrate with regard to questions of credibility of witnesses. This case provides the opportunity for a resolution.

1. Origin of the Preliminary Examination

Since a preliminary examination hearing did not exist under the common law, there is no constitutional right to a preliminary examination. The right of an accused to a preliminary examination, then, is dependent on its creation by either statute or constitutional provision.⁴ In Michigan, the right to a preliminary examination is created by statute. MCL 766.1 gives the state and an accused a right to a prompt examination:

The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.⁵

MCL 766.13 addresses the discharge of defendant and binding over for trial.

§13. If it shall appear to the magistrate at the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause⁶ for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate at the conclusion of the preliminary

⁴21 Am Jur 2d, Criminal Law, § 442; *Gerstein v Pugh et al.*, 420 US 103, 95 S Ct 854, 43 L Ed 2d 54 (1975).

⁵MCL 766.4 requires a date be set for the preliminary examination not exceed fourteen days after the arraignment.

⁶"Probable Cause" is used herein in the sense of determining whether there is a reasonable basis to believe that an offense has been committed and that the defendant committed it. 21 Am Jur 2d, Criminal, § 443.

examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

2. Purpose of the Preliminary Examination

The purpose of the preliminary examination thus is to determine whether there is probable cause to believe a crime has been committed and probable cause to believe that the defendant committed it, for the purpose of, as this court has put it, "weed[ing] out groundless or unsupported charges of grave offenses....," and also to protect the accused from a hasty, improvident, or malicious prosecution.⁷ In Michigan, probable cause does not require proof beyond a reasonable doubt—an examining magistrate is to bind a defendant over for trial if it appears from the evidence, and all reasonable inferences drawn from that evidence, that there is probable cause to believe a crime has been committed and probable cause to believe the defendant committed it.⁸ It is not the function of the examining magistrate to weigh the evidence carefully and discharge the accused when the evidence conflicts or raises reasonable doubt as to guilt, as these questions are solely for the trier of fact.⁹

⁷*People v Duncan*, 338 Mich 489, 501 (1972).

⁸*People v Asta*, 337 Mich 590, 609 (1953); *People v Goecke*, 457 Mich 442, 469 (1998).

⁹*Wayne County Prosecutor v Recorder's Court Judge*, 92 Mich App 119, 122-123 (1979).

B. The Magistrate's Role in Determining When the Charges are Groundless or Unsupported

In order to discern a standard for guiding the magistrate at the preliminary examination, the cases of *Doss, supra*, and *People v King*¹⁰ must be closely examined and, if possible, harmonized.

In *Doss*, a Detroit Police Officer was charged with manslaughter, and after a bindover at the examination a motion to quash, alleging an abuse of discretion on the part of the magistrate, was denied. The Michigan Court of Appeals reversed, finding an abuse of discretion on the ground that under the facts presented at the examination self-defense was not negated. This Court disagreed, reversing the Court of Appeals and upholding the magistrate. The court made the following pertinent observations:

The object of a preliminary examination is not to prove guilt or innocence beyond a reasonable doubt, *nor should a magistrate discharge a defendant when evidence conflicts or raises reasonable doubt of his guilt; such questions should be left for the jury upon the trial.*¹¹

The court also quoted from *Oster*¹², *supra*, that to bind over "*positive proof of guilt is not required... there must be evidence on each element of the crime charged or evidence from which*

¹⁰*People v King*, 412 Mich 145 (1981).

¹¹406 Mich at 103 (emphasis added)

¹²*People v Oster*, 97 Mich App 122 (1980).

those elements may be inferred."¹³ The court concluded that the question of whether the force used by the defendant under the circumstances was excessive was "properly left for the jury."¹⁴

In *King*, (a 4-3 per curium opinion issued without briefing and argument, in lieu of granting leave to appeal) the defendant was charged with first degree murder. The deceased was living with defendant's wife and children while a divorce was in progress. Defendant telephoned deceased (after having consumed a considerable quantity of intoxicants) and made some threats, to which deceased responded with taunting remarks. Defendant went to the residence armed with a pistol, and the deceased attempted to block his entry into the house by leaning against the door. The defendant shot through the door, killing the deceased. Testimony as to defendant's drunken condition was offered. Defendant was bound over on manslaughter. The People appealed, and the circuit court affirmed; however, the Court of Appeals reversed, finding an abuse of discretion on the part of the magistrate, in that in the court's view the magistrate's inquiry should have stopped at the point at which some evidence on each element of the offense charged was presented. This Court, in turn, reversed the Court of Appeals, and upheld the magistrate's decisions finding that the Court of Appeals had too narrowly viewed the function of the magistrate at a preliminary examination, holding that it is the magistrate's duty to pass judgment on the weight and competency of the evidence, and also the credibility of the witnesses, and that the magistrate may consider evidence in defense. The magistrate, said the court, is not limited to whether evidence has been presented on each element of the offense, but

¹³ Emphasis by the court.

¹⁴406 Mich at 103.

must make his decision based on an "examination of the whole matter." The court found in the case before it that under the circumstances there was an insufficient showing of malice and premeditation for murder. The court, however, also stated that the magistrate should not discharge (or reduce the charge) when "evidence *conflicts* or raises reasonable doubt of the defendant's guilt, since that *presents the classic issue for the trier of fact*."¹⁵

At first blush, then, it might appear that *Doss* and *King* are inconsistent, but *King* cites *Doss* with approval. It is necessary, then, to reconcile the statement in *Doss* that to establish the offense "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred," with that in *King*, that "the inquiry is not limited to whether the prosecution has presented some evidence on each element," but an examination of the "entire matter" is allowed, though a magistrate may *not* reduce or discharge simply because the evidence "conflicts or raises a reasonable doubt of the defendant's guilt, since that presents the classic issue for the trier of fact."¹⁶ A standard must be discerned from these statements which permits the magistrate to refuse to bind over even though there is some evidence on each element, or evidence from which the elements may be inferred, but which prohibits the magistrate from refusing to bind over simply because the evidence conflicts or raises a possible reasonable doubt; in short, where it creates issues classically *resolved at trial*. From prior law (e.g. *Duncan*) and from *Doss* and *King*, we may discern the following "rules" and standards:

- The purpose of examinations is to weed out groundless and unsupported charges.

¹⁵412 Mich at 145.

¹⁶*King*, at 154 (emphasis added).

- In so doing, the magistrate may not determine the case as a factfinder at trial, and may not fail to bind over as charged simply because the evidence conflicts or a possible reasonable doubt exists; in short, when there are *triable issues of fact*.
- In examining the whole matter, considering the weight of the evidence and its credibility, and considering evidence in defense (and/or mitigation) which is supplementary to and not in conflict with any prosecution evidence (such conflicts simply creating triable issues), the magistrate may reduce or discharge even where there is some evidence on every element where on that evidence taken as a whole *no reasonable person could find probable cause as to the demonstration of some element*.

Keeping in mind the purpose of the preliminary examination as well as the standard of proof required at the preliminary hearing, one might question whether an abuse of discretion standard best describes the review standard. This brief suggests it is not.

C. Application of the Directed Verdict Standard to the Preliminary Examination

1. Logically Sound Rule

The standard to be met at the preliminary hearing is probable cause; the standard at trial is beyond a reasonable doubt. And at a preliminary examination the prosecution need not present all the testimony or evidence it would present at trial. It is not necessary that the victim even testify, if without the victim's testimony, a prima facie showing from which a reasonable person can find probable cause is demonstrated.¹⁷ By way of comparison, if a motion for directed verdict is made at trial, it can be presumed that the People have presented all of the legally admissible evidence available at the close of their proofs and at the time a motion for directed verdict might be made. The test on a defendant's motion for directed verdict is whether, viewing

¹⁷*People v Meadows*, 175 Mich App 355 (1989).

the evidence and all reasonable inferences gleaned from the evidence in the light most favorable to the prosecution, the evidence would allow a reasonable person to find guilt proven beyond a reasonable doubt.¹⁸ Hence both the standard and the evidence are greater at trial at the time a motion for directed verdict is made than at the conclusion of a preliminary examination when a motion to bind over is made. In ruling on a motion for directed verdict the trial court must be mindful that it is for the jury to decide whom to believe and what testimony of a particular witness to believe.¹⁹ The reviewing court must examine the record in the light most favorable to the government, and it is not the reviewing court's prerogative to retry the case, weigh the evidence, or assess the credibility of witnesses.²⁰ Adopting and applying the directed verdict standard for use at the preliminary examination—geared to probable cause—is logically sound. There should be the same, if not *more*, deference given at the preliminary examination to the credibility-weighting function of the ultimate fact-finder than is given by a judge at trial on a motion for directed verdict after the People conclude their presentation of their proofs. At trial, a judge ruling on a directed-verdict motion is *not* completely free to resolve credibility issues and conflicts in evidence, but has only an extremely limited role. When ruling on a directed-verdict motion the trial judge must view the evidence and all reasonable inferences in the light most favorable to the prosecution to determine whether a reasonable person could find guilt proven

¹⁸*People v Hampton*, 407 Mich 354 (1979); *Jackson v Virginia*, 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 (1979).

¹⁹*People v Bowyer*, 108 Mich App 517 (1981); *US v Carter*, 720 F 2d 941, 14 Fed R. Evid. Serv. 803 (7th Cir. 1983).

²⁰*People v Herbert*, 444 Mich 466 (1993); *People v Hampton*, *supra*.

beyond a reasonable doubt. Where a reasonable person *could* credit testimony showing guilt, or resolve a conflict in evidence in favor of guilt, the judge is required to let the case go to the jury. It is only, then, where no rational person could credit the testimony that a judge has a "credibility-determining" role in ruling on a motion for directed verdict.²¹ To give to the examining magistrate a credibility-determining role that is greater than that of the trial judge when ruling on a motion for directed verdict—where the function of a preliminary examination is to weed out groundless and unsupported charges—is simply illogical. The result would be cases being dismissed at the preliminary examination which could *not* be dismissed on a motion for directed verdict, an absurd result.

This modified directed-verdict standard—that a *prima facie* case is insufficient for bindover on an examination of the whole matter, including defense evidence which is in addition to prosecution evidence and thus is not simply in conflict with it, only when a reasonable person could not find probable cause as to an element, or probable cause that the defendant committed the crime—is thus logically sound. At trial, a directed verdict must be granted when, taking the evidence in the light most favorable to the People (i.e. resolving conflicts in the People's favor), the evidence, though there may be some evidence on every element, is insufficient to allow a reasonable person to find guilt beyond a reasonable doubt.²² In essence, then, the same standard should apply at a probable cause hearing, but, given its more limited role than a trial on the merits, that being to weed out groundless and unsupported charges, and the reduced level of

²¹ Amicus will illustrate this point later.

²²See *People v Hampton*, 407 Mich 354 (1979).

proof required, the standard of "probable cause" for an element must be substituted for "beyond a reasonable doubt," as the law is clear that the magistrate may not fail to bind over simply because the evidence at the probable cause hearing might raise a reasonable doubt. It certainly would make no sense to require the same showing, or a greater showing, to bind over after the limited factual record is developed at a probable cause hearing, than is required to allow the case to go to a jury after a *full* presentation of the case at trial.

2. Consistent with Prior Precedent

As noted earlier, it is very important that the rule announced by this Court be not only logically sound, but legally sound and consistent with prior precedent. *Doss* and *King* must be read to be consistent with each other, if that is possible. Given the two-fold purpose of the preliminary examination—to weed out groundless and unsupported charges, and to give notice to an accused of that which he is charged—weight and credibility should be considered only to the extent that the evidence is, as a matter of law, incredible. In so doing, the magistrate should and must leave questions of fact for the jury, and the magistrate must draw inferences favorable to the prosecution. Doubts about the credibility of a witness do not, and should not, permit a magistrate to discharge the accused as long as the doubts do not obviate a rational conclusion that there is probable cause the defendant committed the felony with which he or she is charged.

Reconciliation of case law mandates the directed-verdict standard or a similar standard be adopted and applied when weighing credibility and determining competency of a witness at the preliminary examination.

3. Adoption of this Standard by Enlightened States

According to a study sponsored by the American Bar Association, the "directed verdict" definition of probable cause is the most common screening standard practiced in other States which have probable cause hearings.²³

The Supreme Court of Kansas has said with regard to the preliminary examination that

1) the court must draw inferences favorable to the prosecution from the evidence presented,

2) evidence at the preliminary hearing need only be sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt,

3) the court's function at the preliminary hearing is not to determine the wisdom of the decision to file charges nor to conclude there should be no prosecution because the possibility of a conviction may be remote or virtually nonexistent.²⁴

4) Specifically, the court cautioned that the question of credibility of a witness at the preliminary examination must be made with the knowledge and conviction that a preliminary examination differs from a trial:

As the court put it:

There is a difference between the quantum of proof essential to a binding over for trial and that required to convict at trial. The guilt or innocence of a defendant is not adjudged at a preliminary examination, and it is not necessary that evidence upon which a

²³See F. Miller, *Prosecution: The Decision to Charge a Suspect With a Crime* (ABA study). See Also Graham & Letwin, *The Preliminary Hearing in Los Angeles*, 18 UCLA Law Review 636 and American Law Institute, *A Model Code of Pre-Arrest Procedure* (Tent. Draft No. 5 § 330.5 (3) (Model Code). "Probable cause to hold a defendant for trial exists ...when the evidence introduced at the preliminary hearing would support a guilty verdict." cited in *Myers v Commonwealth*, 363 Mass 843, fn7; 298 NE2d 819 (1973), 1973 Mass, LEXIS 453..

²⁴*Kansas v Wilson*, 267 Kan 530, 986 P 2d 365 (1999).

defendant is held for trial should be sufficient to support a conviction. It is enough if it shows that an offense has been committed and there is probable cause to believe defendant is guilty.²⁵

While it is the magistrate's duty to assess credibility, the court said, the judge at examination should not discharge the defendant simply due to doubts about the witnesses' credibility.

Likewise, the Colorado Supreme Court en banc reached similar conclusions. In *People v District Court of Colorado's Seventeenth Judicial District*²⁶ the court held that the evidence at the preliminary hearing need be only sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime charged. The court specified that the magistrate is *obligated* to view the evidence in the light most favorable to the prosecution; recognizing the limited nature of the preliminary hearing, the court noted that the circumstances and all reasonable inferences are to be considered, but credibility of a witness cannot be considered unless, as a matter of law, the testimony is implausible or incredible, a mere conflict being a question of fact for the jury.²⁷

The Massachusetts courts have also announced that in a bind-over hearing the judge should view the case as though it were a trial and the judge required to rule on whether there is enough credible evidence to send the case to the jury. In other words, the court must be satisfied that the evidence on each of the elements is not so incredible, insubstantial, or otherwise of such

²⁵ *Kansas v Wilson*, *supra* quoting *In re Mortimer*, 192 Kan 164, 166, 386 P 2d 261 (1963).

²⁶ *People v District Court of Colorado's Seventeenth Judicial District*, 926 P 2d 567 (1996).

²⁷ *Id.*

quality that no reasonable person could rely on it to conclude that the Commonwealth had met its burden of proof.²⁸ The Court cautioned that the judge is not to look to whether he or she is persuaded by the evidence, but rather, the judge is to determine whether the evidence before her is of suitable quality to allow the action to proceed further along a course that was legislatively designed ultimately to place the matter before a trier of fact.²⁹

In Pennsylvania, the Superior Court of Pennsylvania opined that at the preliminary hearing stage, weight and credibility of evidence are not factors for the magistrate; rather, the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense in order to establish a *prima facie* case. Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect and the evidence must be read in the light most favorable to the Commonwealth's case.³⁰

Additionally, Wisconsin has made clear that the question before the magistrate at a bind-over hearing is not which inference to draw, but whether, in the case of multiple possible inferences, any inference supports the conclusion that defendant probably committed a crime—and if any reasonable inference supports that conclusion, the magistrate must bind over the defendant.³¹ Also, Nevada has held that when there is a conflict in evidence at the preliminary examination the magistrate must determine if an inference of criminal agency can be

²⁸*Commonwealth v Blanchette*, 54 Mass App 165 (2002), 2002 WL 359959 (Mass App Ct)

²⁹*Id.*

³⁰*Commonwealth v Marti*, 779 A2d 1177 (2001)

³¹*State v Dunn*, 117 Wis 2d 487 (1984).

drawn from the evidence, thereby leaving the ultimate determination of which witness to believe to the jury:

The accused's explanation of the homicide, being in the nature of a defense, whether true or false, reasonable or unreasonable, is for the trier of fact to consider at trial; and neither the preliminary examination nor the hearing upon a petition for habeas corpus is designed as a substitute for that function.³²

The Nevada courts stress that the preliminary examination is not a substitute for trial. The issue of guilt or innocence is not before the magistrate, and it is not the function of the preliminary examination to fully and completely explore all facets of the case.³³

D. Application of a Modified Directed Verdict Standard Rule to Different Cases

1. Quantum and Quality of Proofs

The beginning of any analysis of the preliminary examination must be the fact that the preliminary examination is a screening stage, screening for groundless and unsupported charges, thereby eliminating charges that should not go to trial because no reasonable person could not find probable cause to believe defendant committed the crime charged. The preliminary hearing is not intended to be a mini-trial. This stage requires "less than evidence which would justify condemnation."³⁴ There are, therefore, differences between a trial and preliminary examination as to both the quanta and modes of proof required.³⁵ And in considering the application of a

³² *Wrenn v Sheriff, Clark County, Nevada*, 87 Nev 85; 482 P 2d 289 (1971).

³³ *Marcum v Sheriff, Clark County, Nevada*, 85 Nev 175, 451 P 2d 845 (1969).

³⁴ *Locke v United States*, 7 Cranch 339, 348, 3 L Ed 364 (1813).

³⁵ See *United States v Ventresca*, 380 US 102, 108, 85 S Ct 741, 13 L Ed 2d 684 (1965).

modified directed-verdict standard to the preliminary examination, the distinction between the quantum of evidence presented and the *quality* of that evidence—where questions of credibility may come into play—must be made. The question before this Court focuses solely on the quality of evidence even if the quantum of evidence is sufficient to demonstrate probable cause on its face. It would seem only logical that under the standard for a bind over at exam situations may occur where the quantum of evidence is sufficient for a bind over—a rational person could find a probable cause to believe that a crime was committed and probable cause to believe the defendant committed it—but that same evidence could be found *insufficient* under the directed verdict standard—a judge might correctly determine that no rational juror could find that same evidence sufficient to prove beyond a reasonable doubt that a crime was committed or that defendant committed it. But if the quality of the evidence is that it is not credible, then whatever the standard of persuasion—probable cause or whether a reasonable factfinder could find guilt beyond a reasonable doubt—the evidence would be either sufficient or insufficient for both the preliminary examination and the directed verdict motion, for if, under the totality of the evidence, the evidence is deemed not credible it should be not credible no matter which level of proof is being applied.³⁶ Amicus will present four hypotheticals to demonstrate the point of the magistrate's role with regard to credibility; that is, with regard to the quality of evidence that is on its face sufficient in terms of quantity, as this is the issue before this Court.

³⁶Though perhaps hyperbolic as an expression of the abuse of discretion standard, *see fn* 39, statements in *Spalding v Spalding*, *infra*, well express the credibility-weighting function of the examining magistrate; testimony should not be credited by the magistrate when it is "so palpably and grossly violative of fact and logic" that no reasonable person could credit it.

2. Credible Evidence/No Conflicts

Hypothetical #1: Defendant is arrested for an armed robbery. The victim positively identifies him at a lineup and from the stand. The defendant would be bound over for trial on this evidence—the magistrate would have a duty to do so—and if a motion for directed verdict is brought at trial on that same evidence, that motion would surely be denied.

Neither at trial nor at the exam should a judge be able to abort a case simply because he or she personally disbelieves evidence that is believable—credible—to a reasonable factfinder at trial. In neither case does a judge have the "discretion" to simply say he/she does not believe the evidence and abort the case.

3. Credible Evidence/Conflicting

Hypothetical #2: Defendant is arrested for an armed robbery. The victim positively identifies him at a lineup and from the stand. The defendant calls 2 alibi witnesses who testify that at the time of the trial the defendant was with them watching television. The defendant would be bound over for trial on this evidence—the magistrate would have a duty to do so—and if a motion for directed verdict is brought at trial on that same evidence, that motion would surely be denied.

This hypothetical is used to illustrate the point that if the evidence conflicts or raises a reasonable doubt it is not the function of the examining magistrate to weigh the evidence carefully and discharge the accused, nor is it the function of the trial judge to resolve these matters at a jury trial. These questions at the preliminary examination stage should be resolved in the light most favorable to the People just as they are at trial, and defendant should be bound over if a reasonable person could find probable cause to believe a crime has been committed by the defendant. It would be inappropriate to give the examining magistrate a credibility-determining role that is greater than that of the trial judge ruling on a motion for directed verdict.

Cases should not be dismissed at the preliminary examination that would not be dismissed at trial in a motion for directed verdict.

4. Incredible Evidence/No Conflict

Hypothetical #3: Defendant is arrested for an armed robbery. The victim positively identifies him at a lineup and on the stand because of a scar on the defendant's face. The perpetrator was wearing a mask, and the victim testifies he has limited x-vision and could see through the mask. The defendant would not be bound over for trial on this evidence—the magistrate would have a duty to dismiss—and if a motion for directed verdict is brought at trial on that same evidence, that motion would surely be granted.

This hypothetical is used to illustrate the fact that even if there is a sufficient quantum of proof to as to each element of the offense, the evidence might be found insufficient because it is so lacking in quality no rational person could credit it.. The magistrate could determine a witness who claims to have x-vision and who is able to see through walls or masks to be incredible and evidence not worthy of belief by any reasonable person.

5. No Credible Evidence/Conflict

Hypothetical #4: Defendant is arrested for an armed robbery. The victim is an alcoholic, who was drunk at the time of the crime, and subject to hallucinations. The victim positively identifies the defendant at a lineup. Twelve priests, on their way to a prayer convention, observed the robbery from their bus window and testified that the defendant was not the perpetrator, and all of them give descriptions of the robber that are consistent with one another. The magistrate could determine from the whole matter that no rational factfinder could credit the prosecution witness, and so find probable cause lacking; and if a motion for directed verdict is brought at trial on that same evidence, that motion would surely be granted on the ground that no rational factfinder could find guilt beyond a reasonable doubt because no rational factfinder could credit the testimony of the witness, even taking the evidence in the light most favorable to the People.

This hypothetical is a difficult one, used to illustrate further that the magistrate in extreme and extraordinary cases may, after considering the totality of the evidence, find the evidence to be so lacking in credibility that no reasonable person could find probable cause to believe a crime was committed by the defendant because of the lack of quality of the evidence. It would be appropriate for the magistrate to find the alcoholic was not a credible witness for reasons that affected his perception and because his testimony was contradicted by several people who did not have a perception problem. This hypothetical also illustrates the difference between the quantum of proof and quality of proof. While the quantum of proof may be sufficient, the quality of proof might undermine the quantum of proof to the degree that it might be found to be inadequate.³⁷ In the same illustration, if the alcoholic testified that he observed the defendant commit the robbery and there were no contradictory witnesses, the magistrate should bind the defendant over for trial even though the alcoholic's perception could be impeached at trial. But in the instant hypothetical, the alcoholic's perception is so thoroughly contradicted at the preliminary examination that the magistrate could refuse to bind the defendant over for trial, finding no reasonable person could find credit in it. Logically, if the quality of proof makes the evidence not credible, the evidence would be not credible for either the preliminary examination or a directed-verdict motion at trial; neither the magistrate nor the trial judge should find that evidence that cannot be credited by a rational person satisfies any burden of persuasion.³⁸ But

³⁷This brief will not discuss quantum of proof, but only the quality of proof and its impact on a credibility determination.

³⁸Taking evidence in the light most favorable to the prosecution should not mean deeming not credible evidence credible. If the evidence is not credible to the extent that no reasonable person could believe it, defendant should not be bound over for trial. Nor, on the same evidence,

consider if the hypothetical was changed slightly and the twelve priests all gave different descriptions of the perpetrator, so that the victim's identification was just one of 13 different identifications made. Should the victim's identification be discredited and found to be not credible *or*, recognizing that none of the witnesses agree, should it be sufficient for a bind over and the defense counsel allowed to impeach him at trial with his questionable perception?³⁹ Amicus suggests that these facts would make the alcoholic's identification no more suspect than the other inconsistencies, and the matter would be one for the trier of fact, however weak the case might be.

Given the limited purposes of the preliminary examination, the determination that evidence is not credible should be made with great caution and limited to those cases where no reasonable person could accept the evidence and use it to make a probable cause determination that a crime was committed by defendant.

E. Standard of Review

The remaining question then is the standard of review if the magistrate determines that the evidence is not credible and therefore not sufficient to bind defendant over for trial. It has long been held that the bind over decision is reviewed for abuse of discretion,⁴⁰ but is that the

should the case go to the jury at trial. It is cautioned, however, that this finding should be in the extreme and unusual cases where the credibility of the evidence is impeached beyond repair.

³⁹The determination that evidence is not credible and therefore not worthy of being considered should be made only in extreme cases.

⁴⁰ The origins of the standard are somewhat murky. It may have been first stated in *People v Dellabonda*, 265 Mich 486 (1933), where the Court said "Primarily the question of probable cause is for the consideration of and determination by the examining magistrate. This court may not agree with the findings of such magistrate, but it has no right to substitute its

proper standard of review?⁴¹ Though at the preliminary examination the judge must determine

judgment for his except in case of a clear abuse of discretion," but cited no authority for the proposition whatever, and may have borrowed it from probable cause to arrest cases. And at one time it was believed that the standard for reviewing the denial of a motion for directed verdict was abuse of discretion, *People v Grant*, 48 Mich App 5 (1973), while it now clearly is reviewed de novo. Review of both the bindover decision and the ruling on a motion for directed verdict should be governed by the same standard of review.

⁴¹ If the Court determines that abuse of discretion remains the appropriate standard of review, then amicus would note that in Michigan, *Spalding v Spalding*, 335 Mich 382, 384-385 (1959) states the commonly cited abuse of discretion test: "The idea of discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Though this statement of the test may be somewhat hyperbolic, that discretion involves choice is clearly correct; it is also true that review of an exercise of discretion must be for more than simple disagreement with the decision reached, or else the review is *de novo* review. As one court has well put the matter:

(a)...point that is difficult for nonlawyers to understand or accept is that because the question...is committed to the discretion of the district judge...it is possible for two judges, confronted with the identical record, to come to opposite conclusions and *for the appellate court to affirm both*. That possibility is implicit in the concept of a discretionary judgment....If the judge could decide only one way he would not be able lawfully to exercise discretion.... *United States v Williams*, 81 F.3d 1434, 1437 (CA 7, 1996)(emphasis in the original).

It is also true, however, that the abuse of discretion standard "must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' Cardozo, *The Nature of the Judicial Process*, 139, 141 (1921). *Discretion without a criterion for its exercise is authorization of arbitrariness.*" *Brown v Allen*, 344 US 443, 496, 73 L Ed 2d 397, 97 L Ed 469 (1953) (emphasis supplied). See also *York Center Park District v Krilich*, 40 F3d 205, 209 (CA 7, 1994).

Helpful to fleshing out the abuse of discretion standard also is the explication of that standard in the federal system. There it is often stated that an abuse of discretion occurs:

- when a relevant factor that should have been given significant weight is not considered;
- when an irrelevant or improper factor is considered and given significant weight, or
- when all improper and no improper factors are considered, but the

whether the quantum of evidence is sufficient to show probable cause, and that it is of sufficient quality to be credited by a rational factfinder, this task is no different in kind than done by a trial judge considering a motion for directed verdict. And review of a trial judge's decision on a motion for directed verdict is considered a question of law, reviewed de novo on the record.⁴² There is no logical reason why review of the magistrate's decision should be any different. The evidence required to show probable cause is relatively low because the assumption is that the prosecution's case will only get stronger if the investigation continues, and further, the prosecution presents not its full case, but only the "bare bones" necessary to show probable cause at the examination; therefore, the probable cause determination made at the preliminary examination requires the magistrate to:

- view all evidence in the light most favorable to the prosecution and draw all reasonable inferences in favor of the prosecution
- not sift or weigh conflicting evidence, but leave those tasks to the factfinder at trial.

court in weighing those factors commits a clear error judgment, which does not mean that the appellate court simply substitutes its judgment for that of the trial court, but that the decision of the trial court is "not within the range of options from which one would expect a reasonable trial judge to select."

See *United States v Van Dreel*, 155 F3d 902 (CA 7, 1998); *Kern v. TXO Production Corp.*, 738 F2d 968, 970 (CA 8, 1984); *United States v McNeil*, 90 F3d 298 (CA 8, 1996). This formulation thus includes consideration of legal error in making the determination of admissibility; if a trial judge were to misconstrue a rule of evidence in making his or her decision, then the ruling may constitute an abuse of discretion. Also, an exercise of discretion predicated upon a clearly erroneous finding of fact could constitute an abuse of discretion. See 1 Robinson, Longhofer and Ankers, *Michigan Court Rules Practice: Evidence* (1997 supplement), § 103.8, p. 6-10.

If this Court maintains the abuse of discretion standard, it should at least clarify it.

⁴² See e.g. *People v. Aldrich*, 246 Mich App 101, 122 (2001).

- not be a rubber stamp for the prosecution, but ensure that all groundless and improvident prosecutions are ferreted, but without weighing the burden of proof in a manner that screens out cases that would go to the jury under the same circumstances at trial.
- submit the case to the jury even if the magistrate subjectively concludes there is a reasonable doubt as to defendant's guilt if there is probable cause to believe a crime was committed and defendant committed it.

If the proper question for the examining magistrate is the directed verdict standard, then should the appellate review standard also be the directed verdict standard on review? Since both the preliminary examination and the directed verdict motion serve as gatekeeping functions, it is sensible for them to share a common standard. For the prosecution to prevail in a directed-verdict motion the trial judge must conclude that a jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt. To prevail at the preliminary examination, the prosecution must produce sufficient believable evidence on all of the elements of the crime charged that fairly and reasonably supports a finding of probable cause that a crime was committed and that defendant committed it. The test on a defendant's motion to quash or dismiss the charges should be whether, viewing the evidence in the light most favorable to the prosecution, the evidence would allow a reasonable person to find probable cause to believe a crime was committed and defendant committed it. Review in either case is de novo. Review of the magistrate's determination should be de novo and without any deference to the magistrate because, like the motion for directed verdict, it is a question of law.⁴³

⁴³See *People v Wright*, 44 Mich App 111 (1972). A challenge to the sufficiency of the evidence does not involve judicial discretion, need not be preserved by a motion for new trial, and may be raised for the first time on appeal. The test on a defendant's motion for directed verdict is whether, viewing the evidence in the light most favorable to the prosecution, the evidence would allow a reasonable person to find guilt proven beyond a reasonable doubt.

The Rest of the Story

With this standard in mind, it is appropriate to discuss what Paul Harvey would deem, "the rest of the story" as to how in *State v Clark*⁴⁴ resolved and clarified the standards involved in the preliminary examination standard. The *Clark* court found de novo review appropriate and the directed-verdict standard legally and logically appropriate. The court concluded the evidence, and all reasonable inferences therefrom, should be viewed in a light most favorable to the State, that the State had shown probable cause, and that the district courts' findings to the contrary should be reversed.

People v Hampton, 407 Mich 354 (1979).

⁴⁴The Utah Court referred to in the beginning of this brief.

RELIEF

WHEREFORE, the Prosecuting Attorneys Association of Michigan, as Amicus Curiae in support of the People of the State of Michigan request that this Honorable Court adopt a modified directed verdict standard for the decision whether to bindover for trial.

Respectfully Submitted,

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President

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A handwritten signature in black ink, appearing to read "J Bartee". The signature is fluid and cursive, with the first letter "J" being large and stylized.

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JMJB/cp